FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 195

No. 172

ERNEST KAY, *Petitioner*,

vs.

UNITED STATES OF AMERICA

Petition For A Writ of Certiorari to the United States Court For The Fourth Circuit

HOWARD VOGEL,
Attorney for Petitioner.

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OPINION BELOW

The opinion of the court below is included in the Appendix herein.

JURISDICTION

By order of the Chief Justice, dated June 17, 1958, the time for filing a petition for writ of certiorari was extended to and including July 15, 1958.

Jurisdiction of this Court is involved by virtue of 28 U.S.C. 1254(1) on the ground that the petitioner, Ernest Kay, was, on July 10, 1957, found guilty by a jury verdict in the United States District Court for the Eastern District of Virginia, Alexandria Division, of having committed the offense of driving a motor vehicle while under the influence of intoxicants and an included lesser offense of reckless driving on a highway under the jurisdiction of the United

States, pursuant to a statute enacted by the legislature of the State of Virginia (Title 18, Section 75, Code of Virginia, 1950, as amended), but adopted by the Congress of the United States under the Assimilative Crimes Act of 1948 (18 USCA 13); that these statutes in combination have operated as a means of depriving petitioner of his liberty in violation of the Fourth, Fifth and Sixth Amendments of the Constitution of the United States; and, that the United States Court of Appeals for the Fourth Circuit, on May 17, 1958, affirmed the conviction in what Petitioner believes to be an incorrect interpretation of Petitioner's rights under the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the proceedings in this case are subject to the limitations of the 4th, 5th and 6th amendments of the Constitution of the United States.

II. Whether the proceedings in this case have violated the illegal search and due process clauses of the 4th and 5th Amendments of the Constitution of the United States.

III. Whether the Virginia Statute which was adopted by the Congress of the United States for certain purposes violates the 6th amendment of the Constitution of the United States in that it deprives the accused of his right to be confronted by the witnesses against him.

STATEMENT OF THE CASE

On December 6, 1956, at approximately 9:15 p.m., Ernest Kay, Petitioner, was driving his car from Washington, D. C. across the 14th Street Bridge going to Virginia. At a point immediately over the bridge in Virginia on U. S. Route 1, a tractor-trailer, driven by one Adin A. Hamlin, collided with the rear end of Kay's automobile. There is conflicting testimony as to the cause of the collision: Hamlin's version attributed the collision to Kay's changing

lanes without caution (TR 26-27)*; Kay's version was that he applied his brakes because of heavy traffic and was struck by the tractor-trailer which had been following him too closely (TR 84-85).

Officer Daril Bragg, U. S. Park Police, investigated the accident and charged Hamlin with following too closely; later the case against Hamlin was dropped and Hamlin appeared as a government witness against Petitioner (TR 8).

Officer Bragg testified that Kay had an odor of alcohol about him and appeared unsteady on his feet but that his speech was unaffected (TR 12-13). Officer Adrian E. Kidwell, U. S. Park Police, who accompanied Officer Bragg in the investigation of the accident testified that he noticed the odor of alcohol on Kay's breath but did not notice that it affected him an any way (TR 20-21). Adin Hamlin, driver of the tractor-trailer, testified that after the accident he and Kay engaged in a violent argument and was standing less than three feet from Kay but did not observe any odor of alcohol about Kay (TR 28-29).

Kay testified that he had two or three drinks between 6:30 and 8:30 P.M. and that during that time he ate two hamburgers and a pizza pie. Kay's testimony was corroborated by his wife, who with Kay and Hamlin were the only eyewitnesses to the accident.

At the conclusion of his investigation, Officer Bragg and Officer Kidwell accompanied Kay in a police cruiser to the Alexandria Hospital where a blood sample was taken from Kay's arm (TR 47). Officer Bragg testified that the blood sample in a vial was turned over to him, that he mailed the vial in a package furnished for the purpose addressed to the Chief Medical Examiner, Richmond, Virginia; that the sample was returned from Richmond to him accompanied by a certificate which stated, among other things: "blood 0.15 per cent alcohol" (TR 61-66). The certificate

* TR refers to TRANSCRIPT PAGE NUMBER

contained an illegible marking in the space provided for the signature of the Chief Medical Examiner which marking could not be identified by Officer Bragg or any other witness present.

On the basis of the testimony of the officer and Title 18, Sections 75.1, 75.2, and 75.3, Code of Virginia, 1950, as amended, the certificate was admitted into evidence over the objections of the Petitioner. Based upon the certificate and above cited sections of the Code of Virginia, the Court instructed the jury that "If there was at the time 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants" . . . and that the facts contained in the certificate are "to be taken by us as true, unless there is evidence to the contrary, and there is none. . . ." (TR 120-121).

Other facts pertinent to the petition will be introduced as appropriate in the argument below.

REASONS FOR GRANTING WRIT

Admittedly, the mounting deaths and crippling injuries caused by automobile accidents require legislative enactments to discourage and penalize negligent drivers. However justifiable the need for such statutes, the individual should not be deprived of Constitutional safeguards as provided in the 4th, 5th and 6th Amendments.

Approximately 28 states have passed laws punishing operators driving "under the influence" of liquor. The provision of the Virginia statute involved in the instant case may very well serve as a pattern for the remaining legislatures and result in future appeals to the Supreme Court of the United States. In order to forestall such possibilities and provide a guide that would prevent a conflict with the United States Constitution, it is felt that a consideration of the present case would be justified.

I. The Assimilative Crimes Act of 1948 (18 USCA 13) approved June 25, 1948, provides:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, could be punishable if committeed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and, subject to a like punishment."

In this connection, it has been held that Congress may incorporate state laws into federal penal statutes, *Hemans* v. *United States,* CCA (Mich), 163 F. 2d 228, cert den 332 U. S. 301; 68 SCt 100, rehearing denied 332 U. S. 821; 68 SCt 152; and that prosecutions under the Assimilative Crimes Act are not to enforce the laws of the States, or Territories, but to enforce the federal law, the details of which were adopted by reference, *People of Puerto Rico* v. *The Shell Co.,* 201 U. S. 253; 58 SCt 167; 82 L.Ed 235; and that the Act applies to state statutes enacted after June 25, 1948 as well as those in force prior to that date, *United States* v. *Sharpnack,* 355 U. S. 286; 78 SCt 291; 2 L.Ed 2d 282. Therefore the present case, involving an arrest of Petitioner by federal officers on lands reserved or acquired by the United States but located in the State of Virginia for an offense which, though defined by a Virginia Statute, is nevertheless an offense against the United States by reason of the Act cited above. It follows that the proceedings in this case and the statutes under which such proceedings were brought are subject to the constitutional guarantees found in the Bill of Rights of the Constitution of the United States.

II. Petitioner's constitutional rights against the use of evidence obtained illegally, against the right not to give self-incriminating evidence, and his right to due process

under the law as provided in the Fourth and Fifth Amendments of the Constitution of the United States, have been violated in the course of the proceedings described herein.

Section 18-75.1 of the Code of Virginia of 1950, provides:

> "Use of Chemical Analysis to Determine Alcohol in Blood; Procedure; Costs; Evidence. In any criminal prosecution under § 18.75, or similar ordinance of any county, city or town, no person shall be required to submit to a determination of the amount of alcohol in his blood, breath, or other bodily substance; however, any person arrested for a violation of § 18.75 or similar ordinance of any county, city or town shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, *provided the request for such determination* is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination and *if he makes such request*, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness. . . . *The failure of the accused to request such a determination* is not evidence and shall not be subject to comment in the trial of the case." (Emphasis supplied).

The above partially quoted subsection is part of one of three subsections added to Section 18-75 of the Code of Virginia by Chapter 557 of the Acts of the General Assembly of the Commonwealth of Virginia, Regular Session, 1956. New Section 18-75.1 provides for a chemical analysis of a blood sample taken at the request of the accused; new section 18-75.2 directs the receipt of a certificate showing the results of the analysis as evidence, and new Section 18-75.3 establishes certain presumptions which arise out of the finding of certain alcoholic content of the sample at the trial of any person accused of operating a motor vehicle under the influence of intoxicants, an act which is prohibited by Section 18-75. The impact and application of

these sections of the Virginia Code in Petitioner's case will be developed presently.

The purpose and intent of similar statutes was examined by this Court in Breithaupt v. Abrams, 352 U. S. 432; 76 S.Ct. 699; 100 L.Ed. 1442. Such statutes usually provide that under certain circumstances competent proof to the effect that at the time a defendant accused of operating a motor vehicle while under the influence of intoxicants was driving such vehicle his blood contained a certain amount of alcohol—usually .15 of 1% or more by weight—will be received in evidence, such proof constituting prima facie proof that the defendant at such time was under the influence of intoxicating liquor. A condition usually found in such statutes is that the accused is not required to submit to such a test. It will be noticed that the Virginia statute goes farther: it requires the accused to *request* suc test.

The evidence in this case shows that the Petitioner, Kay, was informed of his right to a determination of the amount of alcohol in his blood and that he agreed to take the test thinking he was required to submit since he was under arrest (TR 6, 86, 92). There is no evidence in the record showing that Kay so much as suggested the blood test, and the record is clear that he did not request the blood test as is plainly required by the terms of the statute.

Section 18-75.1 further provides:

> "... Only a physician, nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcohol content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon receipt of the blood sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labeled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting

or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample. The certificate, attached to the container shall be returned to either the police officer making the arrest, the department from which it came, or to the clerk of the court in which the matter will be heard: . . ."

The statute plainly requires a physician, nurse or laboratory technician and none other to withdraw blood for the purpse of determining the alcoholic content therein. The obvious purposes of this condition are that (1) in order that the test to be valid, the conditions surrounding the initial steps in the procedure must be controlled so that no foreign matter, drugs, or other material may be present in the blood at the time of analysis, and (2) the health of the subject of the test must be protected.

Officer Bragg testified that he was present when the blood was withdrawn but that he could not testify that it was withdrawn by a doctor. (TR 47), but that it was a man "in a white, two piece uniform". (TR 65). Officer Bragg testified that he was given a vial which contained the blood sample of Kay, and that he wrote a name "Dr. Chao or Ochao" on the label, but did not remember from what source he learned the name. Officer Bragg further testified that he had seen this "man" around the hospital and had seen him "sewing up lacerations, administering anesthesias, taking blood samples" (TR 66), and still further that he was prepared to swear that it was a Chinese man who drew the blood from Mr. Kay: "No question about it." (TR 68).

Miss Helena F. Beattie, Head Nurse, Emergency Room, Alexandria Hospital testified that there was a Dr. Chao on

the staff of this hospital at the time the blood sample was taken, and that the doctor was a woman.

It would appear by the foregoing that the identity of the person who took the blood sample has not been ascertained and it has certainly not been established that the statutory requirement quoted above has been met.

The statute as shown above further requires that the blood sample be placed in a sealed container after calling the fact to the accused attention (TR 71). The only evidence in the record as to calling the accused's attention to these proceedings is Kay's testimony that he was shown nothing at the time the blood sample was taken (TR 90-91).

Evidence gathered as a result of an illegal search may not be used in Federal criminal proceedings. *Weeks* v. *United States*, 232 U. S. 383; 34 SCt 341; 58 L.Ed 652. The intent of Section 18-75.1 of the Code of Virginia is clear: "It is designed for the protection of the accused, to insure the reliability of the report of the test and to protect the validity of the presumptions established by § 18-75.3" *Ernest Kay* v. *United States of America*, CCA 4, [App. p. 3]. This is made doubly clear by the last sentence of the section which reads: "The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case."

The record in this case establishes the fact that none of the important conditions imposed by the statute for the protection of the accused were complied with—rather, it was used as an instrument to compel the accused to give evidence against himself rather than permit him to request the chemical test or to remain silent, thereby putting the burden of proof upon the prosecution without the aid of the blood analysis results. The admission of the blood analysis under the circumstances of this case showing that the evidence was obtained contrary to law has deprived the Petitioner of the due processes of law as guaranteed by the Fifth Amendment of the Constitution. And since Peti-

tioner did not request the blood analysis, its introduction as evidence perfected the illegal search of his person which began with the taking of the blood sample in violation of the provisions of the Fourth Amendment of the Constitution.

III. The statute on its face deprives an accused of the guarantee of the Sixth Amendment that he be confronted by witnesses against him.

The right of confrontation is a common law right. The Sixth Amendment of the Constitution was intended to preserve the right. *Salinger* v. *United States*, 272 U. S. 542, 44 S.Ct. 136, 68 L.Ed. 504. The Amendment restricts Congress from creating new exceptions to the hearsay rule which are contrary to the sound principles underlying the rule. *Matthews* v. *United States*, CCA 5 217 F. 409 at p. 418. 5 Wigmore on Evidence, Section 1397 et seq. Statutes which declare that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact are valid if there is a rational connection between what is proved and what is to be inferred so long as the presumed fact is not made conclusively so. *Manley* v. *State of Georgia*, 279 U. S. 1, 49 SCt 215, 73 L.Ed 575 Such statutes are invalid as violative of the Sixth Amendment if there is no rational connection between the proved fact and the fact inferred therefrom, *Tot* v. *United States*, 319 U. S. 463, 63 SCt 1241, 87 L.Ed 1519.

Under these principles, statutes permitting certain presumptions of fact have been held valid: possession of burglars tools prima facie evidence of intent to commit robbery, *Burnette* v. *Commonwealth*, 194 Va. 785, 75 SE 2d 482; possession of opium prima facie evidence that it was unlawfully imported, *Yee Hem* v. *United States*, 268 U. S. 178, 45 SCt 470, 69 L.Ed 904; and proof that the accused had 0.15 per cent by weight of alcohol in his blood at the time he operated a motor vehicle is sufficient to allow a presumption that the accused was under the influence of intoxicating

liquor, *State* v. *Childress*, 78 Ariz. 1, 274 P 2d 332, 46 A.L.R. 1169.

Section 18-75.2 of the Code of Virginia provides: "When any blood sample taken in accordance with the provisions of § 18-75.1 be forwarded for analysis to the Office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of such vial, tube or container, the copy of such certificate as provided for in § 18-75.1 shall, when duly attested by the Chief Medical Examiner, be admissible in any court or proceeding as evidence of the facts therein stated and the results of the analysis of the blood of the accused."

The pertinent language of section 18-75.3 follows:

"In any prosecution for a violation of 18-75, or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood or breath in accordance with the provisions of § 18-75.1 shall give rise to the following presumptions:

. . . (3) if there was at that time 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants."

The presumption created by section 18-75.3 concededly falls within the principles outlined above concerning valid legislative enactments which create presumptions based on proven facts. The vice in the Virginia statute is that when section 18-75.2 is read together with section 18-75.3, the presumption is not based on proven facts and therefore presumes too much.

In connection with chemical tests concerning persons accused of operating under the influence of intoxicants it has been said that

"When the results of a test are offered in evidence it is necessary to show by foundation evidence that the

test employed was accurate, *Columbus* v. *Mullins*, — Ohio App. —, 118 N.E. 2d 178; that it was properly administered, *State* v. *Hunter*, 4 N.J. Super 531, 68 A 2d 274, affd 79 A 2d 80; by a qualified person, *Lopez* v. *States*, 154 Tex Crim 227, 225 S.W. 2d 852." 2 Wharton's Criminal Evidence, 12th Ed., at p. 585.

It has been held that the results of a chemical test are inadmissible when there is no proof that the chemicals used in the testing were properly mixed or that the individual conducting the test and the testing device were under the supervision of a qualified person, *Hill* v. *State*, 158 Tex Crim 313, 256 S.W. 2d 93.

The presumption that if, at the time the vehicle was operated, the driver had 0.15 per cent alcohol in his blood, such driver was under the influence of intoxicants is reasonable and comports with the best scientific knowledge available on the subject at this time. *State* v. *Childress*, *supra*, and see annotation in 46 A.L.R. 2d 1176. The effect of chemical tests as evidence in criminal cases involving persons accused of driving under the influence is so damaging to the defense that courts have not hesitated to set aside convictions when a proper foundation has not been laid pursuant to the applicable statute, *Rogers* v. *Commonwealth*, 197 Va. 527, 90 S.E. 2d, 257; *Newton* v. *Richmond*, 198 Va. 869, 96 S.E. 2d 775. Under section 18-75.2 of the Virginia Code, it is not necessary that any foundation be laid: the presence of a printed certificate at the trial, even with an illegible mark which purports to be a signature as in this case, is sufficient to establish proof that the accused's blood contained the minimum percentile of alcohol necessary to raise the presumption. The accused is pre-empted from cross-examination of the only witnesses who can establish that the test was properly administered by a qualified person or persons or that the chemicals or machines or procedures used were accurate or valid.

The United States Court of Appeals for the Fourth Circuit in deciding this case on appeal adverted to a similar

statute enacted by the Congress for the District of Columbia as being analogous to the Virginia Statute: Public Law 85-338, 85th Congress, approved March 4, 1958 (citation). The two statutes are distinguishable. The District of Columbia statute provides:

> ". . . if as a result of the operation of a vehicle, any person is tried in any court of competent jurisdiction within the District of Columbia for (1) operating such vehicle while under the influence of any intoxicating liquor . . . and in the course of such trial there is received in evidence, based upon a chemical test, *competent proof* to the effect that at the time of such operation . . . (3) defendant's blood contained fifteen one-hundredths of 1 per centum or more, by weight, of alcohol. . . . such proof shall constitute prima facie proof that defendant at such time was under the influence of intoxicating liquor. . . .". (Emphasis supplied)

The language of instructions to the jury in cases involving similar statutes give to the jury a finding of fact that there was .15 per cent alcohol in the blood of the accused. For example, in *State* v. *Childress*, *supra*, the instruction given was:

> "If there was at that time 0.15 per cent or more by weight of alcohol in the defendant's blood it shall be presumed that the defendant was under the influence of liquor."

Similarly, in the District of Columbia statute quoted above, the prosecution must present *competent evidence* that as a fact there was 0.15 per cent alcohol by weight in the defendant's blood at the time he operated a motor vehicle. Under section 18-75.2 of the Virginia statute an unsworn certificate with an illegible signature is the competent proof of the basic fact upon which the inference or presumption is drawn that the Petitioner was driving under the influence of intoxicants.

The trial Court in the present case makes this clear in

his instructions to the jury. After referring to the contents of the certificate the Court instructed the jury:

> "Those facts are to be taken by us as true, unless there is some evidence in this case to the contrary, and there is none. Of course *it is not proof of what occurred before the vial was mailed, what occurred at the hospital ...*" (TR 120). (Emphasis supplied)

It might be added that it is not proof of what occurred in Richmond, the nature of the test, the qualifications of the analysts, the methods and machines used, and the interpretation of the results by those responsible for the test. To base a presumption upon an unproven fact is to permit hearsay evidence under an exception not known to our law:

> "But, if Congress attempted to create new exceptions to the hearsay rule which were contrary to the sound principles underlying that rule, the very principles which must have been contemplated by the drafters of the Sixth Amendment, could we properly say these were 'legitimately created' or that they did not violate the Constitutional right of confrontation in criminal cases? We think not." *Matthew* v. *United States*, CCA 5 (1954), 217 F 2d 409, 418.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HOWARD VOGEL,
Attorney for Petitioner.

July, 1958

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7599.

ERNEST KAY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

(Argued March 5, 1958. Decided May 17, 1958.)

Before SOBELOFF and HAYNSWORTH, Circuit Judges, and WILLIAMS, District Judge.

Harlan E. Freeman for Appellant, and Henry St. J. Fitz-Gerald, Assistant United States Attorney, (L. S. Parsons, Jr., United States Attorney, on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

This is an appeal from a conviction, in the United States District Court for the Eastern District of Virginia, at Alexandria, upon both counts of an information charging the defendant with driving on a Federal parkway, within the territorial limits of Virginia, while under the influence of intoxicants and with reckless driving.

One afternoon, after his work as a truck driver was done, the defendant, his wife and some friends had several drinks and some food. Afterwards, the defendant undertook to drive himself and his wife from the District of Columbia to their house in Virginia. There was testimony that he was driving erratically as he proceeded across the Fourteenth Street Bridge. Shortly after entering Virginia, while still on the parkway, he was involved in a minor accident. Two United States Park Policemen, investigating the collision, noted the odor of whiskey on the defendant's breath, and they testified to conduct of the defendant which was indicative of intoxication.

The questions raised on appeal grow out of the receipt in evidence of a report of a chemical analysis of the blood of the defendant and the instructions to the jury regarding it.

The Assimilative Crimes Act of 1948 (18 USCA 13) makes applicable here the Virginia statute which prohibits one from driving an automobile "while under the influence of alcohol * * *." (§ 18-75, Code of Virginia) and the Virginia statute which prescribes penalties for the offense (§ 18-76, Code of Virginia). It was assumed in the Court below, and the defendant has raised no question about it here, that the Assimilative Crimes Act also adopted Chapter 557 of the Acts of the General Assembly of the Commonwealth of Virginia, Regular Session, 1956 (§§ 18-75.1, 75.2, 75.3). The new § 18-75.1 provides for a chemical analysis of a blood sample taken with the consent of one accused of a violation of § 18-75; new § 18-75.2 directs the receipt in evidence of a certificate showing the result of the analysis, while new § 18-75.3 establishes certain presumptions which arise out of the finding of the alcoholic content of the sample.[1]

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[1] The relevant sections of the Virginia Code are:

"18-75. Driving Automobile, Engines, etc., While Intoxicated. No person shall drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whiskey, gin, wine, beer, lager beer, ale, porter, stout or any other liquid

The constitutionality of the revised Assimilative Crimes Act in its adoption of subsequently enacted state criminal statutes has recently been sustained. *U. S.* v. *Sharpnack*, 355 U. S. 286, 78 S. Ct. 291, 2 L. Ed. 2d 282. The Act, however, does not generally adopt state procedures. Indeed state interpretation of the adopted statutes is not binding upon a federal court,[2] and federal, rather than state, rules of evidence are applicable to all prosecutions under the Act.[3] But, while § 18-75.1 may be said to be largely procedural, it is a preliminary, pre-judicial procedure which may be employed only with the consent of the accused. It is designed for the protection of the accused, to insure the reliability of the report of the test and to protect the validity of the presumptions established by § 18-75.3. Those pre-

[2] *Johnson* v. *Yellow Cab Transit Company*, 321 U. S. 383, 64 S. Ct. 622, 88 L.Ed. 814.

[3] Rule 26, Federal Rules of Criminal Procedure. See also: *Wolfle* v. *U. S.*, 291 U. S. 7, 54 S. Ct. 279, 78 L. Ed. 617; *U. S.* v. *Bucur*, 7 Cir., 194 F. 2d 297; *Packineau* v. *U. S.*, 8 Cir., 202 F. 2d 681; *Pollock* v. *U. S.*, 5 Cir., 202 F. 2d 281.

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beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature."

"18-75.1. Use of Chemical Analysis to Determine Alchohol in Blood; Procedure; Costs; Evidence. In any criminal prosecution under § 18-75, or similar ordinance of any county, city or town, no person shall be required to submit to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood, breath, or other bodily substance; however, any person arrested for a violation of § 18-75 or similar ordinance of any county, city, or town shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, provided the request for such determination is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination, and if he makes such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness.

"Only a physician, nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing

sumptions are not merely procedural, for they amount to a redefinition of the offense.

Prior to 1956, the offense of driving "while under the influence of alcohol" had not been defined with particularity in the statutes of Virginia. The Supreme Court of Appeals of Virginia held in 1927 that the crime was made out if the driver was under the influence of alcohol to any extent and that it was unnecessary for the Commonwealth to prove that the influence of the alcohol was sufficient to affect his ability to drive with safety. *Owens* v. *Commonwealth*, 147 Va. 624, 136 S. E. 765. More recently, the Supreme Court of Appeals of Virginia applied to this offense, and to other statutes proscribing particular conduct when the actor is intoxicated or under the influence of alcohol, the statutory definition of intoxication contained in § 4-2(14). Under this definition, the effect of the alcohol must be "apparent to observation." *Gardner* v. *Commonwealth*, 197 Va. 945, 81 S. E. 2d 614; *Rodgers* v. *Commonwealth*, 197 Va.

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device, sealed so as not to allow tampering; labeled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample. The certificate, attached to the container shall be returned to either the police officer making the arrest, the department from which it came, or to the clerk of the court in which the matter will be heard.

"Upon the request of the person who was given a chemical test of blood or breath, the results of such test shall be made available to him.

"An amount not to exceed five dollars to cover the costs of taking blood and making an analysis thereof shall be taxed as part of the costs of the case.

"Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court. The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case."

"18-75.2. Report of Results of Analysis to be Filed in Office of Chief Medical Examiner; Admissibility of Copy of Certificate From Such Office. When any blood sample taken in accordance with the provisions of

527, 90 S. E. 2d 257. The Act of 1956 supplied a new and more objective test and definition for an accused who consents to a blood analysis. The new test is designed to protect an accused whose faculties are not impaired, while withholding protection from one, who, under the sobering influence of an accident or arrest, is able temporarily to avoid the appearance of intoxication. As a new definition of the substantive offense, we conclude that it was adopted by the Assimilative Crimes Act of 1948.

The defendant complains that the vial containing the residue of the blood sample and the certificate showing that the alcoholic content of the sample had been determined by chemical analysis to be 0.15 per cent were improperly received in evidence. Since no question was raised as to their proper identification, their receipt in evidence was required by the terms of § 75.2, and, in a federal court, the certificate would have been admissible, in any event, under the provisions of 28 U.S.C.A. § 1732, as a writing made, pursuant

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§ 18-75.1 be forwarded for analysis to the Office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of such vial, tube or container, the copy of such certificate as provided for in § 18-75.1 shall, when duly attested by the Chief Medical Examiner, be administered in any court or proceeding as evidence of the facts therein stated and the results of the analysis of the blood of the accused."

"18-75.3. Presumptions From Alcoholic Content of Blood. In any prosecution for a violation of § 18-75, or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood or breath in accordance with the provisions of § 18-75.1, shall give rise to the following presumptions:

(1) If there was at that time 0.05 per cent or less by weight of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

(2) If there was at that time in excess of 0.05 per cent but less than 0.15 per cent by weight of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

(3) If there was at that time 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants."

to statutory requirement, in the regular performance of the official duty of the Chief Medical Examiner of Virginia. One of the obvious purposes of the Act of 1956 was to prescribe a uniform procedure with adequate safeguards and to provide for proof of the result of the analysis without the necessity of producing as a witness every person through whose hands the sample may have passed in the completion of the established routine.

The receipt in evidence of the certificate does not foreclose, as the defendant suggests, inquiry into the regularity of the procedure, the freedom of the sample from contamination or the accuracy of the chemical analysis. The questions raised by him as to the qualification of the person taking the sample,[4] the possibility of contamination from the fact that the defendant's arm was wiped with alcohol before the needle was inserted into his vein [5] and the effect, if any, of the presence of a white powder, described as an anti-coagulant, in the vial, are all relevant, and there was no restriction upon the defendant in his effort to develop them. Such questions, however, go to the weight of the evidence rather than to the initial admissibility of the certificate. If the proof established a material failure to follow the procedure required by § 18-75.1, it may be that the certificate should be stricken from the record, but the proof here established no such failure.

Admission of the certificate did not deprive the defendant of his right of confrontation by witnesses. Neither the Sixth Amendment to the Constitution of the United States nor Article I, Section 8 of the Constitution of Virginia can be said to have incorporated the rule against hearsay evidence, as understood at the time of their adoption. Each was in-

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[4] There was abundant testimony that the person taking the sample was a Dr. Chao, a member of the staff of the hospital to which the defendant was taken, but the defendant sought to disparage such testimony because of a difference in the recollection of witnesses as to whether Dr. Chao was a man or a woman.

[5] See, however, Gradwohl, *Legal Medicine*, 792-3.

tended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.

The power of the Congress and of a state legislature to provide for the admission of evidence is not subject to any such arbitrary limitation as the defendant supposes. They may carve out a new exception to the hearsay rule, without violating constitutional rights, where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under long established exceptions to the hearsay rule. See *Tot* v. *U. S.*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519; *U. S. Leathers*, 2 Cir., 135 F. 2d 507; *Matthews* v. *U. S.*, 5 Cir., 217 F. 2d 409.

Certificates quite comparable to this one have been held admissible over objection upon similar constitutional grounds. See *Bracey* v. *Commonwealth*, 119 Va. 867, 89 S. E. 144; *State* v. *Torello*, 103 Conn. 511, 131 A. 429; *Commonwealth* v. *Slavski*, 245 Mass. 405, 140 N. E. 465. *Commonwealth* v. *Stoler*, 259 Mass. 242, 156 N. E. 71. The alcoholic content of the blood, the evidentiary fact sought to be proved by the certificate, may be accurately determined by well recognized chemical procedures. It is an objective fact, not a mere expression of opinion, and its proof by introduction of the certificate violates no constitutional right of the defendant.

Finally the defendant complains that the Court informed the jury of the presumptions created by § 18-75.3, asserting, first, that if is a "presumption founded upon a presumption," and, second, if it does more than shift the burden of going forward with evidence, it is a denial of due process of law.

If there be evil in founding one presumption upon another where the relation between the evidentiary fact and

the ultimate fact sought to be proved is unduly attenuated, there is no such situation here. Indeed, the presumption arises directly from the evidentiary fact, the alcoholic content of the blood, and does not rest upon those preliminary assumptions of regularity which were made when proof of the evidentiary fact was allowed by the receipt in evidence of the certificate. There is no rule that facts proven under exceptions to the hearsay rule, though received in evidence, must be denied all evidentiary value.

Nor does consideration by the jury of the statutory presumptions deprive the defendant of any protected right. The presumptions embody the standards determined, after extensive investigation, by the Committee on Tests for Intoxication of the National Safety Council (1940 Report).[6] They have been adopted by many states, and, recently, the Congress enacted similar presumptions for use in prosecutions in the District of Columbia.[7] The adoption of the standards as evidentiary presumptions serves to dispense with the necessity of expert witnesses to interpret the laboratory findings, but there is nothing objectionable in the legislature's adoption of that course when the standards are reasonable and have attained wide acceptance. This is particularly true when the presumptions may be founded only upon analyses of blood samples, a procedure which may be accomplished without the substantial possibility of error which may be inherent in some procedures for the analysis of exhaled breath.

The presumption here is rebuttable. It neither restricts the defendant in the presentation of his defense nor deprives him of the presumption of innocence. Since wide experience has demonstrated the close connection between the presumed fact and the alcoholic content of the blood, there is no constitutional objection to the jury's consideration, with all of the other evidence, of the statutory presumption.

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[6] See, generally, 1 Gray, Attorneys' Textbook of Medicine, 3rd Ed., Ch. 59.

[7] Public Law 85-338, 85th Congress, S. 969, approved March 4, 1958.

Heiner v. *Donnan*, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772; *Western & Atlantic Railroad Co.* v. *Henderson*, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884; *Hawes* v. *State of Georgia*, 258 U. S. 1, 42 S. Ct. 204, 66 L. Ed. 431; *Yee Hem* v. *U. S.*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904; *Mobile Jackson & Kansas City Railroad Company* v. *Turnipseed* 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78; *Burnette* v. *Commonwealth*, 194 Va. 785, 75 S. E. 2d 482; *State* v. *Childress*, 78 Ariz. 1, 247 P. 2d 333; *Toms* v. *State*, Okla. Cr., 239 P. 2d 812.

Affirmed.

CAPTION OMITTED

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

Upon the application of the appellant, by his counsel, and for good cause shown,

It is now here ordered that the mandate of this Court in the above entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by the Supreme Court or this Court, provided the application for the writ of certiorari is filed in the Supreme Court within thirty days from May 17, 1958.

May 29, 1958.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

A true copy,

Teste:
RICHARD M. F. WILLIAMS, JR., *Clerk*
U. S. Court of Appeals for the
Fourth Circuit.

Teste: